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Case No.: 2:10-cv-0144-RLH-PAL

## ORDER

(Motion to Dismiss-#18; Countermotion  
to Amend-#20)

Defendants.

1 Montevista, and Rhome Simon, a mental health technician and classroom assistant at the hospital.  
 2 According to Plaintiff, Defendants' unlawful actions led to her decision to resign from her  
 3 employment, even though she "performed all of her duties in a satisfactory manner." (*Id.*)

4 Plaintiff alleges she resigned from her job because Defendants discriminated  
 5 against her based on her race. First, Plaintiff alleges Todd promised her that she would receive a  
 6 wage increase if she became licensed to teach in the State of Nevada. After Plaintiff obtained her  
 7 teacher's license, however, Todd allegedly refused to raise her wages because she is African-  
 8 American. Second, Plaintiff alleges that Simon wrongfully accused her of stealing electronic  
 9 equipment from the hospital and that she made "disparaging remarks about Plaintiff's African  
 10 American heritage." (Dkt. #1, Compl. ¶ 17.) According to Plaintiff, as a result of this hostile  
 11 work environment, she had no choice but to resign from her employment with Montevista.

12 Plaintiff timely filed a discrimination claim with the Equal Employment  
 13 Opportunity Commission ("EEOC"), and on July 24, 2009, the EEOC mailed her a right-to-sue  
 14 letter. On October 22, Plaintiff filed suit in Nevada state court against Defendants and alleged  
 15 claims for (1) unlawful discrimination under Title VII; (2) unlawful discrimination under NRS  
 16 613.330; (3) negligent infliction of emotional distress; (4) intentional infliction of emotional  
 17 distress; (5) negligent hiring; (6) negligent supervision; and (7) negligent training. On February 1,  
 18 2010, Defendants removed the case to this Court based on federal question jurisdiction.  
 19 Defendants now move to dismiss Plaintiff's complaint. Plaintiff has opposed this motion and filed  
 20 a countermotion for leave to amend. For the reasons discussed below, the Court grants  
 21 Defendants' motion to dismiss in part and denies it in part, and denies Plaintiff's countermotion to  
 22 amend.

## 23 DISCUSSION

### 24 I. Legal Standard

25 A court may dismiss a plaintiff's complaint for "failure to state a claim upon which  
 26 relief can be granted." Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide "a short

1 and plain statement of the claim showing that the pleader is entitled to relief.” While a pleading  
 2 generally need not contain detailed allegations, it must allege sufficient facts “to raise a right to  
 3 relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A  
 4 complaint does not allege sufficient facts to raise a right to relief above the speculative level if it  
 5 contains nothing more than “labels and conclusions” or a “formulaic recitation of the elements of a  
 6 cause of action.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Papasan v. Allain*, 478  
 7 U.S. 265, 286 (1986)). Instead, in order to survive a motion to dismiss, a complaint must contain  
 8 sufficient factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 129 S. Ct. at  
 9 1949 (internal citation omitted).

10 In *Ashcroft v. Iqbal*, the Supreme Court provided a two-step approach for district  
 11 courts to apply when considering motions to dismiss. First, the court must accept as true all  
 12 factual allegations in the complaint. *Id.* at 1950. A court does not, however, assume the truth of  
 13 legal conclusions merely because the plaintiff casts them in the form of factual allegations. *Id.* at  
 14 1950; *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003). Mere recitals  
 15 of the elements of a cause of action, supported only by conclusory statements, also do not suffice.  
 16 *Iqbal*, 129 S. Ct. at 1949. Second, the court must consider whether the factual allegations in the  
 17 complaint allege a plausible claim for relief. *Id.* at 1950. “A claim has facial plausibility when the  
 18 plaintiff pleads factual content that allows the court to draw a reasonable inference that the  
 19 defendant is liable for the alleged misconduct.” *Id.* at 1949. Thus, where the complaint does not  
 20 permit the court to infer more than the mere possibility of misconduct, the complaint has  
 21 “alleged—but not shown—that the pleader is entitled to relief.” *Id.* (internal quotation marks  
 22 omitted). When the claims in a complaint have not crossed the line from conceivable to plausible,  
 23 plaintiff’s complaint must be dismissed. *Twombly*, 550 U.S. at 570.

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1 **II. Motion to Dismiss**

2 The Court considers Plaintiff's claims as follows:

3 **A. Title VII and NRS 613.330**

4 Under Title VII, "it is unlawful for an employer to discriminate against any  
5 individual based upon the individual's race, color, religion, sex, or national origin." 42 U.S.C. §  
6 2000e-2. Likewise, under Nevada's anti-discrimination statute it is "an unlawful employment  
7 practice for an employer to . . . discriminate against any person with respect to the person's  
8 compensation, terms, conditions or privileges of employment, because of . . . race, color, religion,  
9 sex, sexual orientation, age, disability, or national origin." NRS § 613.330(1)(a).

10 Although Plaintiff does not provide many details in her complaint, the Court finds  
11 she has sufficiently stated a claim under both Title VII and NRS 613.330. Plaintiff alleges that  
12 Todd denied her a promotion even though she obtained her teaching certificate and that Simon  
13 wrongfully accused her of stealing equipment from the hospital. Plaintiff alleges Defendants'  
14 actions were motivated by race and that Simon, in particular, made derogatory comments about  
15 African-Americans. Taking these allegations as true, the Court finds Plaintiff has stated a viable  
16 discrimination claim under both of these statutes.

17 Nonetheless, the Court dismisses these claims as to the individual Defendants,  
18 Diana Todd and Rhome Simon. It is well-established that Title VII only imposes liability on  
19 employers and that employees cannot be liable under this statute. *Miller v. Maxwell's Int'l Inc.*,  
20 991 F.2d 583, 587–88 (9th Cir. 1993). The same is true for Nevada's anti-discrimination statute,  
21 NRS 613.330. *Apeceche v. White Pine County*, 615 P.2d 975, 976 (Nev. 1980). Thus, Plaintiff  
22 may bring these claims against Montevista, but they are not proper against the individual  
23 Defendants. The Court therefore dismisses these claims as to Todd and Simon.

24 **B. Intentional and Negligent Infliction of Emotional Distress**

25 Plaintiff also alleges that Defendants are liable for intentional infliction of  
26 emotional distress. In order to state a claim for this tort in Nevada, a plaintiff must allege that (1)

1 the defendant engaged in extreme and outrageous conduct with the intention of causing emotional  
2 distress or with reckless disregard for the plaintiff's emotional distress; (2) the plaintiff suffered  
3 severe or extreme emotional distress as a result; and (3) the defendant's actions were the  
4 proximate cause of plaintiff's emotional distress. *Jordan v. State*, 110 P.3d 30, 52 (Nev. 2005).  
5 According to Plaintiff, by refusing her justified request for a pay increase, wrongfully accusing her  
6 of stealing equipment, and making racially derogatory comments towards her, Defendants acted  
7 with "wanton and/or willful disregard" for her rights and should therefore be liable for intentional  
8 infliction of emotional distress. (Dkt. #1, Compl. ¶ 27.)

9           The Court disagrees with Plaintiff and grants Montevista's motion to dismiss this  
10 claim because Plaintiff has not stated facts to indicate that Montevista or its employees  
11 intentionally acted in an extreme and outrageous manner. Although the Court certainly does not  
12 condone any form of racial discrimination, such discrimination—standing alone—is not sufficient  
13 to give rise to a tort claim based on extreme and outrageous conduct. Thus, even if Montevista  
14 and its employees denied Plaintiff proper pay and made derogatory racial comments toward her,  
15 this misconduct is properly addressed by federal and state anti-discrimination statutes, not  
16 independent tort claims reserved for the most egregious behavior. *See Brooks v. Hilton Casinos,*  
17 *Inc.*, 959 F.2d 757, 766 (9th Cir. 1992) (holding that, as a general rule, allegations of  
18 discrimination in the workplace do not amount to claims for intentional infliction of emotional  
19 distress). Accordingly, the Court grants Montevista's motion to dismiss this claim.

20           In addition to alleging a claim for intentional infliction of emotional distress,  
21 Plaintiff brings a claim for negligent infliction of emotional distress. This claim fails because  
22 Plaintiff does not allege any facts in her complaint indicating that Defendants were negligent in  
23 any way. The only concrete factual assertions Plaintiff makes in her complaint indicates that  
24 Defendants acted intentionally, not negligently. Plaintiff alleges she suffered emotional distress  
25 because Defendants intentionally denied her a promotion and intentionally accused her of stealing  
26 equipment. These assertions, even if true, do not state a claim based on a theory of negligence.

1 Because Plaintiff alleges Defendants intentionally discriminated against her, her claim for  
2 negligent infliction of emotional distress is improper and is hereby dismissed.

3 **C. Negligent Hiring, Negligent Supervision, and Negligent Training**

4 In order to maintain a claim for negligent hiring, supervision, or training in Nevada,  
5 a plaintiff must allege that his or her employer breached its duty to properly hire, train, or  
6 supervise its employees. *Burnett v. C.B.A. Sec. Serv., Inc.*, 820 P.2d 750 (Nev. 1991); *Jespersen v.*  
7 *Harrah's Operating Co.*, 280 F. Supp. 2d 1189, 1194–95 (D. Nev. 2002). Plaintiff admits she  
8 does not make any such allegation in her complaint against Montevista. Instead, she alleges that  
9 “the simple fact that Defendants Todd and Simon acted in a discriminatory manner toward [her]  
10 gives rise to a plausible claim for negligent hiring and training.” (Dkt. #20, Opp’n 7.) This  
11 argument is entirely incorrect. Nevada law does not permit any such inference: in order to allege a  
12 claim for negligent hiring, supervision, or training, the plaintiff must allege facts specifically  
13 indicating how the employer violated this duty. *Burnett*, 820 P.2d 750. The fact that an employee  
14 acts wrongfully does not in and of itself give rise to a claim for negligent hiring, training, or  
15 supervision. *Id.* Accordingly, the Court grants Defendants’ motion to dismiss these claims.

16 **III. Motion to Amend**

17 In addition to opposing Defendants motion to dismiss, Plaintiff has filed a  
18 counter motion to amend her complaint. The Court denies Plaintiff’s counter motion because she  
19 has not complied with Local Rule 15-1, which states that a party seeking leave to amend must  
20 “attach the proposed amended pleading to any motion to amend.” Without a proposed amended  
21 complaint, the Court cannot determine whether Plaintiff’s motion for leave to amend is proper.  
22 *See Gardner v. Martino*, 563 F.3d 981, 991 (9th Cir. 2009) (denying motion for leave when  
23 plaintiff failed to attach proposed amended complaint or indicate the basis for seeking  
24 amendment). Accordingly, the Court denies Plaintiff’s counter motion to amend.

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**CONCLUSION**

Accordingly, and for good cause appearing,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (#18) is  
GRANTED in part and DENIED in part as follows:

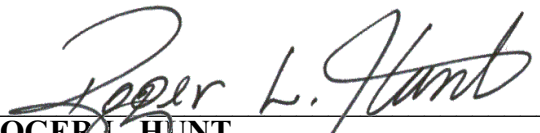
Defendants' Motion is GRANTED as to all claims except Plaintiff's claim  
under Title VII and NRS 613.330.

IT IS FURTHER ORDERED that Plaintiff's claims under Title VII and NRS  
613.330 are DISMISSED as to Diana Todd and Rhome Simon.

IT IS FURTHER ORDERED that Diana Todd and Rhome Simon are  
DISMISSED from this case.

IT IS FURTHER ORDERED that Plaintiff's Countermotion to Amend (#20) is  
DENIED.

Dated: June 9, 2010.

  
**ROGER L. HUNT**  
Chief United States District Judge